No. 173.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

UNITED STATES SMELTING REFINING AND MINING COMPANY, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, and UNION PACIFIC RAILROAD COMPANY, *Appellees*.

and

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY and AMERICAN SMELTING AND REFINING COMPANY, *Appellees*.

Consolidated Causes

On Appeal from the United States District Court for the District of Utah

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR APPELLEE AMERICAN SMELTING AND REFINING COMPANY

JOHN F. FINERTY
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MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM

Argument of this case was had on February 13 and 14, 1950. At that time, counsel were not advised of the most recent decision of the Interstate Commerce Commission in the so-called *Staley* case. This new decision was dated February 6, 1950, and apparently published and served on February 14, 1950, and is entitled *Can-*

cellation Terminal Charges at Decatur, Ill., I. & S. Docket No. 5387. It has a direct and important bearing on the instant case, to which we desire to call the Court's attention.

This new decision came to the attention of the undersigned on Thursday, March 9. This Motion and Memorandum are presented as promptly as possible.

Wherefore, it is requested that this Court permit the filing of the attached Supplemental Memorandum.

Respectfully submitted,

JOHN F. FINERTY
Attorney for Appellee.

March, 1950

SUPPLEMENTAL MEMORANDUM

At the argument before this Court on February 13 and 14, 1950, counsel for appellee urged that the decision below should be affirmed, since it was incontestable that the carriers were already fully compensated by way of the "line-haul" rates for the terminal services which they rendered. Such was the decision of the District Court; indeed, that Court found that on this record it was res judicata that such compensation is included in the "line-haul" rates.

Counsel for appellants attempted to meet this contention by asserting that the issue was not as to the compensability of the rates; rather, they urged, that the issue was whether the Commission could be prevented, in an *Ex parte* 104 proceeding, from segregating a single rate into its "line-haul" and "terminal" components. Such a segregation, the argument went, was required by the Commission's finding that the "line-haul" ended at the "assembly yard" or interchange tracks. The suggestion was advanced that only when such a segregation was made could the Commission determine whether the compensation for each segment was proper. Considerable reliance was placed on the decision of the Commission in *A. E. Staley Mfg. Co., Terminal Allowances*, 245 I. C. C. 383, as sustained by this Court in *United States* v. *Wabash R. Co.*, 321 U. S. 403.

It is not the purpose of this Memorandum to repeat the several arguments already made to show that the order of the Commission in the present case cannot be treated solely as a "segregation" order. Rather, we show here that in its most recent decision in the *Staley* case itself, which decision was not brought to the attention of the Court in briefs or argument, the Com-

mission has made clear that it, at least, does not regard the segregation of "line-haul" and "terminal" charges as essential. This decision thus deals a fatal blow to the justification referred to above for the Commission's order in the instant case.

This latest decision of the Commission, a further proceeding in the very Staley proceeding which has already been before this Court, is entitled *Cancellation of Terminal Charges at Decatur, Ill.*, I. & S. Docket No. 5387, and *A. E. Staley Mfg. Co. Terminal Allowances*, I. & S. Docket No. 4736, decided February 6, 1950, and, counsel is advised, served and made public on February 14, 1950. (Ten mimeographed copies of this decision have already been lodged with the Clerk.) In that proceeding, the two respondent carriers had filed schedules "to cancel the charge for spotting interstate traffic at the plant of A. E. Staley Mfg. Co." (Sheet 1). These schedules were suspended by the Commission, but such suspension has now been set aside by the Commission's latest decision, and the cancellation of such spotting charges has been authorized. It is important to note that the Commission, in connection with this latest order, has not revoked its original finding (215 I. C. C. 656, 660) that

> "We find * * * that the transportation service for which the respondents are compensated in their line-haul rates, begins and ends at certain points (*i.e.* interchange tracks)."

See also 245 I. C. C. 383, 385. Nor has the Commission revoked its prior finding that the "line-haul" transportation service begins and ends at the interchange tracks. See 215 I. C. C. 659-660.

By this latest decision of the Commission in the *Staley* case, the Commission has now:

1. Held, that the determination of where the "line-haul" ends does not require segregated charges for service before and service after that point, even in a case in which this Court had already sustained a prior refusal by the Commission to permit cancellation of separate terminal charges,

2. Authorized, the "de-segregation" of previously segregated "line-haul", and "terminal" spotting, charges.

3. Necessarily appears to have found, that there is no violation of Section 6 (7) of the Interstate Commerce Act in the performance by carriers of terminal spotting services on industrial tracks, without, so far as appears, any compensation whatever to the carriers for such terminal spotting services.

The Commission's only justification for this reversal of its prior decision is that the plant trackage and operating procedure at the Staley plant have been somewhat improved, thereby lessening the magnitude of the carriers' terminal spotting services.

It is to be observed, however, despite this lessening, that the Commission's latest report shows that each of the two carriers now sends a locomotive into the plant twice a day for the sole purpose of terminal switching and spotting services, and that on the average about eleven locomotive hours of service per day were rendered to the plant by the two carriers in such terminal switching and spotting services during the test period, (see sheets 12 and 13). It is also to be observed that the terminal spotting charges which the Commission has now authorized to be cancelled, cover, so far as the Wabash Railroad is concerned, 10 different buildings or other locations where cars are loaded or unloaded, and so far as the Baltimore & Ohio is con-

cerned, 14 such different buildings or other locations, (see sheet 7).

This latest decision of the Commission in the *Staley* case is, therefore, irreconcilable (1) with the representations of its counsel on argument in the instant case that the segregation of all line-haul and terminal charges is essential, and (2) with the Commission's finding of violation of Section 6 (7) in the instant case, by reason of the rendition of terminal switching services without charge in addition to the line-haul rates.

JOHN F. FINERTY
Attorney for Appellee.

March, 1950